

This record is a partial extract of the original cable. The full text of the original cable is not available.

UNCLAS SECTION 01 OF 03 MAPUTO 001446

SIPDIS

STATE FOR AF/S, AF/EPS, EB/IFD/OIA

MCC FOR APPLGARTH, HEWKO, BRIGGS, GAULL

STATE PASS OPIC FOR SHORE

SENSITIVE

E.O. 12958: N/A

TAGS: [EINV](#) [MZ](#) [OPIC](#) [MCC](#)

SUBJECT: OPIC-SUPPORTED US INVESTOR IN MOZAMBIQUE BACKS INTO
EXPENSIVE SETTLEMENT ON LAND DISPUTE

Business Confidential Information. Not for Internet Distribution

1. (SBU) Summary: On October 28, American investor David Herbert and his Danish partner Jorgen Nielsen settled a dispute with the Zimbabwean firm Cabo do Mar over rights to the land on which their Nyati Beach Lodge is located. They agreed to pay usd 650,000 to permanently block execution of an October 17 provincial court order declaring that Cabo do Mar held usage rights to the land and authorizing eviction of current occupants. OPIC had financed Mr. Herbert's purchase earlier this year of half of the lodge. Before the negotiations that led to the settlement, Ambassador La Lime had expressed to GRM officials USG concern over the threats to a U.S. investment, and OPIC President Peter Watson had written the Prime Minister. Mr. Herbert is exploring his legal options. Several aspects of this matter are not clear, and it provides another example of factors that discourage investment in Mozambique. End Summary.

Potter Concession

2. (U) In 1994, Zimbabwean lodge developer Rex Potter purchased the rights for 50 years to a ten-hectare plot of beach land on the Sao Sebastiao peninsula in Inhambane province from the government (it is not clear whether provincial or national) for 30 million meticaís, worth about usd 2,500 at the time. Mozambican law does not recognize ownership of land; it does, however, concede to individuals and corporations the right to build on land. The improvements made upon that land may be registered as private property. Disputes involving conflicting concessions are common.

3. (U) In 2001, Mr. Potter and his Mozambican company, Cabo do Mar, registered improvements with the Inhambane provincial registry and board of deeds, stating that three huts and a restaurant had been established. Mr. Potter never established a functioning beach lodge on the property, however, and Mr. Herbert and his staff state that the claimed improvements are an exaggeration at best.

Formation of Sanctuary, Issuance of Nyati Concession

4. (U) In 1998, the Ministry of Tourism formed the Vilanculos Coastal Wildlife Sanctuary, a land trust including the peninsula in which no building could be constructed without permission of the government. The Sanctuary itself is a private corporation, owned by multiple investors, with a certain degree of autonomy to manage the area. However, since 1999, the Ministry of Agriculture and Rural Development has been solely responsible for granting land concessions within the Sanctuary lands.

5. (SBU) In November 2002, when Mr. Nielsen was in the process of negotiating a deal to buy rights to the land on which Nyati Lodge now stands, Cabo do Mar sued the Sanctuary to block the deal. The Inhambane provincial judge dismissed Cabo do Mar's claims after reviewing documents, ruling that his court was not the appropriate venue for hearing such a case. On November 23, 2002, Inhambane province governor Aires Bonfifacio Baptista Aly issued a letter to all parties stating that the Sanctuary was the sole owner of the property in question and that the planned Nyati Lodge project should be encouraged to continue.

6. (SBU) In June 2003, the Sanctuary issued a concession of 11 hectares to Nyati Beach Lodge Lda., a Mozambican firm owned by Nyati Beach APS, a Danish firm owned by Mr. Nielsen. It appears that this concession overlaps the concession granted by the GRM in 1994 to Mr. Potter. Mr. Nielsen started construction of an upscale lodge immediately, registered his improvements with the provincial registry, and started business in early 2004.

Ruling By New Judge For Potter

7. (SBU) In March 2004, new Inhambane provincial judge Jose Sampaio decided to hear Mr. Potter's case anew. (Sampaio, who had arrived in 2003, previously had served as a judge in Cabo Delgado province, where he was best known for having been the presiding judge in the 2000 Montepuez incident, in

which over 100 protestors were jailed after an opposition rally protesting the results of the 1999 elections and subsequently asphyxiated in a tiny jail cell.) After reading the documents and without initiating a formal hearing, in March Judge Sampaio ruled in favor of Mr. Potter and Cabo do Mar, awarding Cabo do Mar \$300,000 in damages from the Sanctuary. The Sanctuary intended to appeal the case, a process that would likely draw it out by two years or more. However, it failed to turn in its \$10 filing fee with the court until late September, ten days past the deadline. According to the Sanctuary, a notice of the fee due was not served to the Sanctuary's legal representatives in Maputo; rather, it was given to a lower-level employee in Inhambane who did not act. By failing to appeal on time, Sanctuary was out of options.

Herbert Purchase of Stake in Lodge

18. (SBU) In August 2004, U.S. citizen David Herbert, who owns part or all of three other concessions in the Sanctuary, purchased 50 percent of Nyati from Mr. Nielsen for \$225,000 with OPIC financing and began making improvements.

Enforcement Order Threatens Eviction

19. (SBU) On October 17, Judge Sampaio issued a court order giving Cabo do Mar the right to occupy the Nyati property. On October 20, Rex Potter and Inhambane police showed up at Nyati lodge to enforce an immediate eviction. Mr. Herbert says this was the first the Sanctuary lawyers or Nyati Lodge had heard of the court order. After preliminary talks with lodge staff, Mr. Potter agreed to postpone eviction until October 28.

Judicial Efforts

10. (SBU) Mr. Herbert and Nyati Lodge then became directly involved for the first time. Mr. Herbert flew to the provincial capital, Inhambane city, on October 27 in order to seek a dispatch blocking any eviction proceedings on lands within the Sanctuary. An Embassy Econ-Pol officer accompanied him as an observer. Sanctuary lawyers were not present. At the same time, Mr. Herbert and his partner sought other support, including from the U.S. and Danish governments, in their effort to delay enforcement of the eviction order. We understand that the environment minister, who is a Sanctuary board member, asked the Attorney General to intervene but was told that only a court could do so. OPIC President Watson wrote Prime Minister Luisa Diogo, and Ambassador La Lime spoke with several senior GRM officials, to express concern about this threat to a U.S. investment.

11. (SBU) It appeared that Mr. Herbert and Nyati's lawyers had received no solid information from the Sanctuary about the validity of Mr. Potter's claims. They did not have a copy of Mr. Potter's 1994 land concession, a map of the concession, or even Judge Sampaio's October court order. The lack of information was especially puzzling since Mr. Herbert had assumed the role of Chairman of the Sanctuary's board in August 2004.

12. (SBU) Judge Sampaio was not inclined to meet with the Nyati lawyers and forced them to wait for several hours. Despite what appears to have been pressure by senior judicial and government officials, he did not grant the delay Mr. Herbert sought. On October 28, he granted a dispatch stating that a hearing would be held on the subject on November 9. While it could be argued that the dispatch prevented any eviction proceedings by virtue of setting a hearing date on the matter, it did not explicitly make a statement to that effect.

Negotiation and Settlement

13. (SBU) In the afternoon of October 28, the Nyati group (plus observing Embassy officer) flew to the town of Vilanculos to meet that day with representatives from Cabo do Mar. By this time, the Nyati team recognized it was in a weak position and was willing to negotiate a settlement with Cabo do Mar. Mr. Herbert was particularly concerned by reports from Mr. Nielsen that Cabo do Mar had contacted Danish media outlets about the possibility of an eviction of the mostly Danish guests from Nyati that weekend, a potential public relations disaster.

14. (SBU) At the negotiations, Mr. Herbert and his group agreed that Cabo do Mar had a valid court order recognizing its rights to a piece of land on Sao Sebastiao peninsula overlapping with the property subsequently developed by Nyati. Cabo do Mar, for its part, acknowledged that it did not have legal right to use the buildings of the Nyati Lodge, but asserted a right to shut them down, and threatened to do so. Mr. Herbert offered to find Cabo do Mar an equivalent parcel of property within the Sanctuary,

but Cabo do Mar was not interested. No deal was reached at the table, but a few hours later the parties agreed to terms: Mr. Herbert and Mr. Nielsen would pay Cabo do Mar usd 450,000 up front, plus usd 20,000 per month for the next ten months, in return for which Cabo do Mar would not enforce the court order in perpetuity. After the deal was struck, no eviction took place on October 29. The final agreement is being drafted the week of November 1.

Much Remains Unclear

15. (SBU) There are a number of murky aspects to this matter. The Cabo do Mar partners at the negotiating table included a member of the National Assembly from the ruling Frelimo party, Eleuterio Marta Felisberto. Mr. Felisberto had been working at the Inhambane province land registration office in 1994 when Mr. Potter's concession was granted. Mr. Herbert suspects that the judge's decision to reopen a case decided by a predecessor and rule in favor of Cabo do Mar without a hearing after only examining documents may have been influenced by Mr. Felisberto, but he has no proof. The Sanctuary's failure to pay its appeal fee on time also appears to have resulted from the court's action in informing Sanctuary employees, rather than its lawyers; Mr. Herbert at one point alleged that this was the result of corruption, but the Sanctuary may have dropped the ball. It also is not clear what Mr. Nielsen or Mr. Herbert knew, or should have known, about Mr. Potter's claim and the judge's decision against the Sanctuary before Mr. Nielsen sold half of the lodge to Mr. Herbert.

Next Steps

16. (SBU) Mr. Herbert and Nyati Lodge have not decided what legal actions to take next. The most likely is that the lodge may sue the Mozambican government for damages, a hearing that would be held in an administrative court in Maputo. This would be a drawn-out process, but may be a viable option since there are precedents of the GRM paying damages to aggrieved parties in the wake of disputes caused by conflicting government concessions of business or land rights. Another would be for Nyati to sue the Sanctuary directly. Nyati would like to take legal action of some sort against Cabo do Mar as well, but it may not have a viable case. Regardless of what steps are taken, the developments in this case provide another example of how Mozambique's legal and judicial systems discourage investment.

LA LIME